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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 344.

MARGARET CONWAY, *Petitioner*,

v.

GEORGE H. O'BRIEN, *Respondent*.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HERBERT G. BARBER,
FENTON E. BATTON,
Brattleboro, Vermont.

PAUL E. LESH,
JEROME F. BARNARD,
1422 F Street, N. W.,
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Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In respondent's brief (p. 7) it is said that the opinion in *Lowden* v. *Denton*, 110 F. 2d 274, does not sustain the point to which the case is cited by petitioner. Such a suggestion requires reply.

The point to which this and cases from several other circuits were cited (our brief, p. 27) was that where judgments contrary to verdicts have been ordered by Circuit Courts of Appeal, there had been motions for such judgments within ten days after the verdict in accordance with Rule 50 (b). Respondent says that the procedure in *Lowden* v. *Denton* might have been similar to that followed by the respondent in the case at bar, in which event the case would not support petitioner's contention, the respondent basing his contention on the fact that the reported opinion does not indi-

cate what motions were filed by the defendants in the cited case.

Certiorari was applied for in *Lowden* v. *Denton* upon a ground not relevant to the present case, and the transcript of record was filed May 7, 1940, in this Court as Case No. 984 of the October 1939 Term. The record shows that the motions defendants had filed in that case were a motion for directed verdict at the close of the plaintiff's case (R. No. 984, p. 100), a motion for directed verdict at the close of all the evidence (id. 149), and a motion to have the verdict set aside and to have judgment entered for the defendants in accordance with the motion for directed verdict, filed within six days after the verdict (id. 11). The last mentioned motion is in the words of Rule 50 (b) and is undoubtedly what the Circuit Court of Appeals referred to when it said "the defendants have meticulously complied with the provisions of this rule." There were proceedings in the appellate court which are interesting but not directly relevant.*

It is respectfully submitted that it does affirmatively appear that the procedure approved in *Lowden* v. *Denton* was essentially different from that followed by the respondent in the case at bar in that the defendants therein did make

*The Circuit Court of Appeals had first filed an opinion February 28, 1940, directing a new trial, rejecting defendants' contention that final judgment should be directed for them upon the ground that their motion for directed verdict was denied without reservation and the verdict accepted unconditionally (id. 243). Defendant appellants moved March 7, 1940, to modify the opinion and judgment so that it would direct final judgment for them (id. 211). Plaintiff appellee resisted the motion upon the ground that practice under Rule 50 (b) should follow state practice to the effect that only a new trial and not final judgment should be ordered unless the appellate court was fully convinced that plaintiff could not make out a better case on retrial, citing cases to that effect (id. 235). The Court of Appeals, however, granted the motion and after quoting the rule and disposing of the contention that it was necessary to take a verdict conditionally and holding that no express reservation is necessary under the rule, proceeded to order final judgment for the defendant by the sentence quoted in our original brief (p. 27) upon the ground that the defendants had meticulously complied with the provisions of Rule 50 (b).

the motion for judgment notwithstanding verdict in the lower court which is essential to a claim of error on its denial. Therefore, *Lowden* v. *Denton* was properly cited as an example from the Eighth Circuit of the approval of the procedure which has been followed in all circuits excepting the Second Circuit from which will come the case at bar if certiorari is granted.

Respondent (brief, p. 7) cites also to the same point, viz., that the motion authorized by Rule 50 (b) is not necessary, *Demers* v. *Railway Express Agency*, CCA 1, 108 F. 2d 107. This case was one in which the entry of a judgment notwithstanding the verdict was affirmed. The proceedings in the District Court do not appear in the opinion, but counsel inform us the record (No. 3494 CCA 1, and No. 7272 District Court) shows a motion by defendant for directed verdict, not granted, a verdict for plaintiff December 23, 1938, and a motion by defendant December 28, 1938, that the verdict be set aside and judgment for defendant be entered in accordance with the prior motion for directed verdict, which latter motion was granted. It was the judgment so entered by the District Court which was affirmed by the Circuit Court of Appeals in the decision respondent mistakenly cites to support his contention that the motion for judgment notwithstanding the verdict is not necessary.

On the other point made by petitioner, viz., that the Circuit Court of Appeals erroneously assumed to be true facts upon which there was contradictory testimony, respondent's brief contends that petitioner is asking this Court to "make an extended review of the evidence and the inferences to be derived therefrom" (pp. 4-5). It requires no extended review of the evidence by this Court to verify the fact that there was testimony contrary to the version of the facts accepted as true by the Circuit Court of Appeals on the important issues of the respective speeds of the colliding cars. Petitioner is not seeking to have this Court determine what

the truth was, but only that there was contradiction in the evidence on these points where the Court of Appeals asserted there was none (petition, pp. 3-5; brief, pp. 17-19). In view of the record references given in the petition to the contradiction of respondent's testimony as to his own speed (petition, p. 5), it is surprising to find in respondent's brief a repetition of his reference to his own testimony as "uncontradicted" (respondent's brief, p. 4).

Respectfully submitted,

HERBERT G. BARBER,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Docket No. 344

MARGARET CONWAY,

Petitioner

V.

GEORGE H. O'BRIEN,

Respondent

MOTION TO DISMISS WRIT OF CERTIORARI OR AFFIRM JUDGMENT

Now comes George H. O'Brien, the respondent in the above entitled cause by Fenton, Wing & Morse, Esqs., and Edwin W. Lawrence, Esq., his attorneys, and moves the Court that the petitioner's writ of certiorari in said cause be dismissed, or that the judgment of the Circuit Court of Appeals for the Second Circuit be affirmed for the following reasons:

The said petitioner has failed to file a brief with this Honorable Court as required by Rule 27 of the Revised Rules of the Supreme Court of the United States.

Portland Company v. United States, 15 *Wall.* 1.

Dated at City of Rutland, in the County of Rutland and State of Vermont the 30th day of December A. D. 1940.

GEORGE H. O'BRIEN

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